



Date: April 29, 1998
Case No.: 97-INA-300

In the Matter of:

LYLE AND/OR ROSALINDA LARNER
Employer,

On Behalf of:

EMILIA TADIOSA
Alien.

BEFORE: Burke, Guill, and Vittone,
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This matter arises from a request for review by the Board of Alien Labor Certification Appeals of a denial of alien labor certification by a U.S. Department of Labor Certifying Officer ("CO").¹ Employer is a family seeking to fill the position of "Domestic Cook." (AF 203).²

In a Notice of Findings ("NOF") dated March 26, 1996, the CO proposed to deny certification on the ground that, *inter alia*, the requirement for experience in Filipino cooking was unduly restrictive for the position offered by Employer because it exceeded the requirements listed in the Dictionary of Occupational Titles ("DOT") for that of a "Domestic Cook."³ (AF 195-98).

¹ Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A), and the implementing regulations at 20 C.F.R. Part 656.

² References to the appeal file are abbreviated "AF."

³ 305.281-010 COOK (domestic ser.): Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired, or other persons and be designated Family-Dinner Service Specialist (domestic ser.).

Employer submitted timely rebuttal, including a detailed affidavit describing the cook's proposed duties, and the amount of time Employer anticipated it would take to complete them. (AF 152-57). Employer also argued in rebuttal that Rosalinda Larner was Filipino and required that style of cuisine, and that Employer hosted an occasional dinner for a Filipino student scholarship association ("PSAC"), and thus business necessity justified the requirement that any applicant have experience cooking Filipino cuisine. (AF 150, 152-57).

The CO issued a Final Determination ("FD") on July 23, 1996, denying the application for certification. (AF 142-46). She found Employer's rebuttal unpersuasive, stating that it did not show a need for a full-time cook -- especially because Rosalinda Larner had been performing all of the proposed cook's duties herself, with only the help of her two preschool age children while she continued to work full-time. (AF 145). Further, the CO found that the business necessity justification, proffered to overcome the unduly restrictive job requirement, fell short of the requirements as only Rosalinda Larner preferred Filipino cuisine, and that Employer had produced no documentation, beyond a statement that it did so occasionally, showing that it hosted even one of the PSAC dinners the previous year. (AF 145-46). The CO also observed that, in its affidavit, Employer also says that the cook will be preparing nonfat meals for the husband, and low sodium meals for the elder daughter, as they both have medical conditions that require special diets, and thus will not be eating Filipino cuisine. (AF 146).

Thereafter, Employer filed a Motion to Reconsider and a Request for Review. (AF 2-141). In that motion, Employer made much of the fact that on twelve previous occasions, labor certification had been granted by COs based on factual circumstances similar to Employer's. (AF 4-5). The CO denied the Motion to Reconsider on the ground that it did not address issues that could not have been addressed in the rebuttal, and forwarded the appeal to the Board. (AF 1).

The assertion in Employer's Motion to Reconsider that the CO, and by implication the Board, should find for it because on twelve previous occasions the CO certified applications which had some factual similarities with this matter is not persuasive.⁴ (AF 4-5). Each labor certification application involves its own set of facts and issues, and, therefore, "submission of another employer's approved application does not set any precedent to which the CO [or the Board] is bound." *Paralegal Priorities*, 94-INA-117 (Feb. 1, 1995). Therefore, Employer's submission of prior approved labor certifications is not determinative in this matter.

Employer's proffered justification of business necessity, in response to the CO's finding that the job requirements were unduly restrictive, does not survive scrutiny. A requirement that an applicant have experience in a particular field is unduly restrictive if it exceeds the requirements mentioned in the DOT. 20 C.F.R. § 656.21(b)(2). Here, Employer's requirement that the applicant have experience cooking Filipino cuisine (AF 203) exceeds the DOT specifications for a

GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 6 DLU: 81

⁴ This panel is assuming, for the purposes of argument, that the issue of prior application approval was timely raised, and properly considered by the Board on review. See *Huron Aviation*, 88-INA-431 (July 31, 1989) (presenting new arguments after FD, however, is tantamount to an untimely rebuttal).

domestic cook.⁵ Therefore, the requirement is unduly restrictive and Employer must prove, through adequate documentation, a business necessity for the requirement. 20 C.F.R. § 656.21(b)(2)(i).

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). Employer argues that this test is not applicable because it is a family and not a business, but argues alternatively that it would meet the requirements if the test were applicable. (AF 150). Here, the relevant business for purposes of applying the business necessity test is the "business" of running a household. *Marion Graham*, 88-INA-102 (Mar. 14, 1990) (*en banc*).

The *Information Industries* standard requires that the employer show (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Employer cites Rosalinda Larner's preference for homemade Filipino dishes as evidence of its business necessity. (AF 153-54).

This evidence simply does not prove that the requirement is a business necessity. To prove business necessity, the employer needs to provide some level of specific documentation as to why a cook with two years of experience -- the maximum number of years of experience listed in the DOT for a domestic cook -- cannot, without an inordinate amount of training, learn to properly prepare Filipino cuisine, even without any prior experience doing so. Employer does not, for example, provide any evidence tending to show that Filipino cooking is more difficult to master than other types of cooking. Employer does not provide even a partial listing of the specific Filipino dishes the cook might have to serve, or why Employer could not, or does not wish to, train the cook to prepare those dishes. Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. *Analysts International Corporation*, 90-INA-387 (July 30, 1991). Therefore, on the basis of the evidence in the record, Employer has not proved the existence of a business necessity.

As Employer failed to persuade us that the CO erred in finding that experience cooking Filipino cuisine is an unduly restrictive job requirement for a domestic cook, we will affirm the CO's denial of labor certification. Accordingly, the following Order shall enter.

⁵ See *supra* note 3.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the Panel:

TODD R. SMYTH
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.